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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Jonathan Marshall, et al.,

10 Plaintiffs,

11 v.

12 La Mesa Rehabilitation and Care Center, et
13 al.,

14 Defendants.

No. CV-15-02082-PHX-DLR

ORDER

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16 Plaintiff John Marshall, individually and on behalf of decedent Melissa Marshall,
17 brings a medical negligence and wrongful death action against Defendants La Mesa
18 Rehabilitation and Care Center and Five Star Senior Living.¹ At issue is Defendants'
19 motion for summary judgment on Plaintiff's punitive damages claim (Doc. 86), which is
20 fully briefed. For the following reasons, the Court grants Defendants' motion.²

21 **I. Legal Standard**

22 Summary judgment is appropriate when there is no genuine dispute as to any
23 material fact and, viewing those facts in a light most favorable to the nonmoving party,
24 the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is
25 material if it might affect the outcome of the case, and a dispute is genuine if a reasonable

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27 ¹ Plaintiff also brought this action on behalf of Nicholas Marshall and Ruth
Juantilla, but the parties later stipulated to the dismissal of these plaintiffs. (Doc. 99.)

28 ² Defendants' request for oral argument is denied because oral argument will not
help the Court resolve the pending motion. Fed. R. Civ. P. 78(b); LRCiv 7.2(f).

1 jury could find for the nonmoving party based on the competing evidence. *Anderson v.*
2 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Villiarimo v. Aloha Island Air, Inc.*, 281
3 F.3d 1054, 1061 (9th Cir. 2002). Summary judgment may also be entered "against a
4 party who fails to make a showing sufficient to establish the existence of an element
5 essential to that party's case, and on which that party will bear the burden of proof at
6 trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary
7 judgment "bears the initial responsibility of informing the district court of the basis for its
8 motion, and identifying those portions of [the record] which it believes demonstrate the
9 absence of a genuine issue of material fact." *Id.* at 323. The burden then shifts to the
10 non-movant to establish the existence of a genuine and material factual dispute. *Id.* at
11 324.

12 Additionally, this District's Local Rules of Practice impose specific requirements
13 on the form and content of summary judgment motions. "Any party filing a motion for
14 summary judgment must file a statement, separate from the motion and memorandum of
15 law, setting forth each material fact on which the party relies in support of the motion."
16 LRCiv 56.1(a). Each of these facts "must refer to a specific admissible portion of the
17 record where the fact finds support (for example, affidavit, deposition, discovery
18 response, etc.)." *Id.* Likewise:

19 Any party opposing a motion for summary judgment must file
20 a statement, separate from that party's memorandum of law,
21 setting forth:

22 (1) for each paragraph of the moving party's separate
23 statement of facts, a correspondingly numbered paragraph
24 indicating whether the party disputes the statement of fact set
25 forth in that paragraph and a reference to the specific
26 admissible portion of the record supporting the party's
27 position if the fact is disputed; and

28 (2) any additional facts that establish a genuine issue of
material fact or otherwise preclude judgment in favor of the
moving party. Each additional fact must be set forth in a
separately numbered paragraph and must refer to a specific
admissible portion of the record where the fact finds support.

1 LRCiv 56.1(b). The court may deem a movant's separate statement of facts to be true if
2 the nonmoving party does not comply with these rules. *See Szaley v. Pima Cty.*, 371 Fed.
3 App'x 734, 735 (9th Cir. 2010).

4 **II. Factual Background**

5 Preliminarily, Defendants submitted a separate statement of facts setting forth
6 each fact upon which they rely in their memorandum of law, along with corresponding
7 citations to evidence in the record supporting those factual assertions. (Doc. 87.) In
8 violation of LRCiv 56.1(b), however, Plaintiff did not submit a separate statement of
9 correspondingly numbered paragraphs indicating whether he disputes or admits the facts
10 asserted by Defendants, along with additional facts that he believes preclude summary
11 judgment. Because Plaintiff failed to submit a separate statement of facts, his
12 memorandum of law fails to "include citations to the specific paragraph in the statement
13 of facts that supports assertions made in the memorand[um]." LRCiv. 56.1(e). The
14 Court therefore may deem Defendants' separate statement of facts to be undisputed for
15 purposes of this order.³ *Szaley.*, 371 Fed. App'x at 735.

16 Nevertheless, Defendants' motion is not premised on the Court adopting their
17 version of the facts as undisputed. Defendants concede that there are genuine factual
18 disputes touching on the merits of Plaintiff's negligence and wrongful death claims. They
19 contend, however, that summary judgment may be entered on Plaintiff's request for
20 punitive damages because such damages are not available even under Plaintiff's view of
21 the facts. With that in mind, the following is the factual background material to
22 resolution of this motion.

23 Melissa Marshall ("Marshall") was admitted as a patient at La Mesa Rehabilitation
24 and Care Center ("La Mesa" or "the facility") on August 23, 2013. Upon admission,

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26 ³ Plaintiff's response memorandum also violates LRCiv 7.1(b) by presenting
27 footnotes in a font size smaller than 13 point. Defendants' submissions are not without
28 flaws, either. Of note, a number of Defendants' separate statements of "fact" contain
impermissible *argument* over the materiality of positions Defendants anticipate Plaintiff
will take. (*See, e.g.*, Doc. 87 ¶ 12.) The parties are encouraged to review this District's
Local Rules of Practice to ensure that future filings comply.

1 Marshall underwent an evaluation to assess her status as an elopement risk. Given
2 Marshall's dementia and her history of exit seeking behavior, she was characterized as at
3 risk. As a result, Marshall was fitted with a WanderGuard, a device which signals an
4 alarm when the patient wearing it tries to exit the facility.

5 La Mesa's staff conducted periodic elopement assessments of Marshall, regularly
6 characterizing her status as at risk. Plaintiff contends that in August 2014 Marshall's risk
7 status improperly was downgraded. (Doc. 91 at 7, 8.) Nevertheless, the staff continued
8 to have Marshall wear her WanderGuard device, regularly checked the WanderGuard to
9 ensure that it was properly functioning, and stationed a staff member near the front door
10 during regular business hours.

11 On October 23, 2014, Marshall eloped from the facility, exiting from the front
12 entrance unnoticed by La Mesa's staff. Marshall subsequently fell in the parking lot
13 adjacent to the facility. Based on La Mesa's internal investigation, it was determined that
14 Marshall exited the facility when a vendor, utilizing a metal dolly, held the front door
15 open for her. La Mesa determined that the metal dolly interfered with the signal emitted
16 by the WanderGuard sensors attached to the door, preventing the alarm from sounding
17 when Marshall exited the building. As part of the internal investigation, La Mesa staff
18 also tested Marshall's WanderGuard device and found it functioning properly. Plaintiff
19 contends, however, that Marshall's sock covered her WanderGuard, obstructing the
20 sensor and contributing to its failure to trigger the alarm. (Doc. 91 at 7, 9.) Plaintiff also
21 questions whether a La Mesa staff member was at the front desk at the precise moment
22 she escaped.

23 After Marshall's fall, she was taken to Yuma Regional Medical Center. Although
24 a CT scan of her brain was clear, an MRI showed bilateral subdural hematomas. As a
25 result of her scans and decline in her mental status, Marshall was intubated and
26 transferred to St. Joseph's Hospital in Phoenix for neurological intervention. Marshall
27 remained at St. Joseph's from October 25, 2014 until November 4, 2014, with no
28 improvement. Upon discharge, it was noted that Marshall "had never awoken from her

1 deep encephalopathy secondary to sepsis and underlying brain disease, compounded by
2 the right subdural hematoma." Marshall was transported from St. Joseph's to hospice,
3 and died the following day.

4 **III. Discussion**

5 "In Arizona, punitive damages are awarded only in the most egregious of cases,
6 where it is proved by clear and convincing evidence that the defendant engaged in
7 reprehensible conduct and acted with an evil mind." *Sec. Title Agency, Inc. v. Pope*, 200
8 P.3d 977, 995 (Ariz. Ct. App. 2008) (quotations, citations, and alterations omitted). "A
9 defendant acts with the requisite evil mind when he intends to injure or defraud, or
10 deliberately interferes with the rights of others, consciously disregarding the unjustifiable
11 substantial risk of significant harm to them." *Hyatt Regency Phx. Hotel Co. v. Winston &*
12 *Strawn*, 907 P.2d 506, 518 (Ariz. Ct. App. 1995) (quotations and citations omitted).
13 Though a plaintiff may prove the requisite evil mind through circumstantial evidence, "a
14 jury will not be permitted to consider an award of punitive damages if the evidence
15 supporting such an award is only slight or inconclusive." *White v. Mitchell*, 759 P.2d
16 1327, 1333 (Ariz. Ct. App. 1988).

17 Here, there is no evidence that Defendants intended to injure Marshall, and
18 Plaintiff does not argue otherwise. Instead, Plaintiff argues that punitive damages are
19 recoverable because Defendants consciously disregarded a substantial and unjustifiable
20 risk that Marshall would escape and injure herself. Given Marshall's dementia and
21 history of exit seeking behavior, a jury reasonably could find that Defendants were aware
22 of such a risk. But even under the most favorable reading of the evidence, a jury could
23 not reasonably conclude that Defendants consciously disregarded that risk.

24 To the contrary, undisputed evidence shows that Defendants responded to this risk
25 by implementing a number of measures designed to reduce the likelihood that Marshall
26 would escape. For example, Defendants conducted an initial assessment of Marshall's
27 elopement risk, determined the reasons for her exit seeking behavior, adopted a care plan
28 to reduce the risk of elopement, fitted Marshall with WanderGuard, regularly checked the

1 device's functionality, conducted periodic risk assessments to update her risk level, and
2 stationed a staff member at the front desk during regular business hours. Given this
3 evidence, no reasonable jury could find that Defendants consciously disregarded the risk
4 that Marshall would escape. (Docs. 87 at 5; 87-1 at 9-13, 16, 63, 65-66, 70-82, 84-88,
5 104-105; 91 at 7-9.)

6 Plaintiff argues, among other things, that Defendants improperly downgraded
7 Marshall's risk level and that they failed to take additional measures, like training non-
8 nursing staff on elopement. (Doc. 91 at 8, 10.) Though a jury could find that Defendants'
9 actions were inadequate and that they were negligent in not implementing more effective
10 measures, punitive damages may not be awarded "based on gross negligence or mere
11 reckless disregard of the circumstances." *Volz v. Coleman Co., Inc.*, 748 P.2d 1191, 1194
12 (Ariz. 1987). Instead, the relevant inquiry is whether Defendants' actions (or lack
13 thereof) were motivated by spite, actual malice, or a "conscious and deliberate disregard
14 of the interests and rights of others." *Gurule v. Ill. Mut. Life and Cas. Co.*, 734 P.2d 85,
15 87 (Ariz. 1987). That Defendants did not remove Marshall's WanderGuard or otherwise
16 deviate from their security measures despite downgrading Marshall's elopement risk
17 belies Plaintiff's claim that they acted with conscious and deliberated disregard.

18 To show otherwise, Plaintiff relies on two distinguishable cases. (Doc. 91 at 10-
19 11.) The first, *Bickler v. Senior Lifestyle Corp.*, No. CV-09-00726-PHX-DGC, 2010 WL
20 2292985 (D. Ariz. June 8, 2010), involved a care facility patient who was injured when
21 another patient with a known history of combativeness pushed her down. The court
22 denied the facility's summary judgment motion on punitive damages, finding that there
23 was an issue of fact as to whether the facility consciously disregarded the risks posed by
24 the assaultive patient because it stood to benefit financially from housing him. That is,
25 the financial incentive served as circumstantial evidence that the facility consciously
26 disregarded the risk of harm to the plaintiff. *Id.* at *7. Likewise, the second case,
27 *Edwards ex rel. James v. Manorcare, Inc.*, No. CV 03-018-TUC-FRZ, 2006 WL
28 6255440 (D. Ariz. Oct. 19, 2006), involved a care facility patient who was injured in a

1 fall at an understaffed facility. The plaintiff presented evidence that the facility knew it
2 was inadequately staffed, and the court denied summary judgment on punitive damages
3 because a reasonable jury could infer that the facility deliberately understaffed to further
4 its financial interest. *Id.* at *3-*4. Here, in contrast, Defendants responded to Marshall's
5 elopement risk, and no evidence has been offered that Defendants' actions or omissions
6 were motivated by financial self-interest.

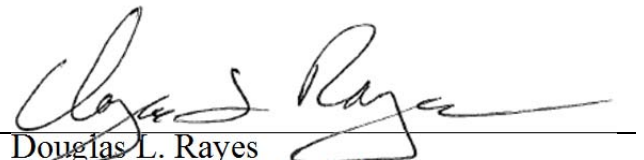
7 **IV. Conclusion**

8 Defendants do not seek summary judgment on Plaintiff's tort claims. Whether
9 Defendants were negligent in their response to Marshall's elopement risk remains a
10 question for the jury to decide. But even under the most generous reading of the facts, no
11 reasonable jury could conclude by clear and convincing evidence that Defendants
12 consciously and deliberately disregarded Marshall's elopement risk. Though this might be
13 a case of gross negligence or reckless disregard of the circumstances, it simply does not
14 present the type of egregious conduct or evil motives for which Arizona courts have
15 specially reserved punitive damages. For these reasons,

16 **IT IS ORDERED** that Defendants' motion for summary judgment (Doc. 86) is
17 **GRANTED.**

18 Dated this 18th day of December, 2017.

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Douglas L. Rayes
United States District Judge